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No. 222

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In the Supreme Court of the United States

OCTOBER TERM, 1958

HUBERT MASON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 6-9) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1958 (C.A. 9).[1] The petition for a writ of certiorari was filed on July 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The proceeding had in the Court of Appeals, referred to as "C.A.", is separately paginated.

QUESTION PRESENTED

Whether the trial court erred in stopping a line of questioning designed to determine whether or not a co-indictee, not on trial, had made an extra-judicial confession which might have exonerated petitioner, where defense counsel did not attempt to call the co-indictee as a witness or show his non-availability.

STATEMENT

An indictment filed August 16, 1957, in the United States District Court for the District of Colorado charged that petitioner and Howard Daniels had received and concealed 167 grains of heroin, in violation of 21 U.S.C. 174 (R. 2). Following a separate jury trial, petitioner was found guilty as charged (R. 106-107), and was sentenced to five years' imprisonment (R. 4). On appeal, the conviction was affirmed.

The facts relating to the single issue raised by petitioner may be summarized as follows:

After petitioner and Daniels had been apprehended (R. 10, 35), and the heroin recovered (R. 10-12, 36, 56-58, 60, 72-73),[2] they were taken to the Police Building in Denver, Colorado, and interrogated separately by federal narcotics agents Marsh and Gress. Petitioner denied that he had had any heroin, denied

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[2] There were three packages or units of heroin involved. One package was dropped in the street by petitioner just before his apprehension (R. 10, 36, 56). One package was found under the dog house in petitioner's yard (R. 12). The third unit, a single capsule of heroin, was found in petitioner's front yard (R. 60). Admittedly, petitioner consented to the examination of his premises (Pet. 3).

that the heroin which the agents had recovered was his, and denied that he knew anything about the heroin (R. 27, 61).

After the foregoing information was elicited from agent Gress at petitioner's trial, the following exchange took place on cross-examination (R. 28):

> Q. Was Mr. Daniels present at that time?
>
> A. They weren't in the room together.
>
> Q. They were not in the room together?
>
> A. No, sir.
>
> Q. Did Mr. Daniels make any statement to you?
>
> MR. PFEIFFER: If it pleases the Court, that would be hearsay.
>
> THE COURT: If he wishes to interrogate, I do not think it would be admissible against this defendant. I do not see how it would be admissible.
>
> MR. BUCKLES: The only thing we have in mind, we do not know what statement was made or perhaps could have been made that is perhaps beneficial to the defendant.
>
> MR. PFEIFFER: Perhaps also it is detrimental.
>
> MR. BUCKLES: If we open the door and it is detrimental, we will suffer the consequences.
>
> THE COURT: I do not see how it would be admissible if it wasn't made in the defendant's presence.
>
> MR. BUCKLES: I understood that to be a protection for the defendant.
>
> THE COURT: It may be, but I think that is the rule. I think I will sustain the Government's objection to it.

ARGUMENT

Admittedly the trial court's ruling is correct under *Donnelly* v. *United States*, 228 U.S. 243. There, the defendant, who was on trial for murder, offered to prove that a third person, one Joe Dick, who died before trial, had confessed to the killing. There was evidence indicating that only one person had participated in the shooting. Defendant also offered to prove that Dick lived in the vicinity and presumably knew the habits of the victim; that the human tracks at the scene of the crime led toward Dick's camp; and that other signs indicated that whoever made the tracks suffered from consumption, a disease which Dick had. On this showing, this Court upheld the district court's ruling excluding Dick's confession as hearsay evidence. The *Donnelly* case has been uniformly and often followed by the lower courts. *Jeffries* v. *United States*, 215 F. 2d 225, 226 (C.A. 9); *Smith* v. *United States*, 106 F. 2d 726, 727 (C.A. 4); *Trefonc* v. *United States*, 67 F. 2d 954, 955 (C.A. 10); *Boyd* v. *United States*, 30 F. 2d 900, 901 (C.A. 9); *Neal* v. *United States*, 22 F. 2d 52, 55 (C.A. 4); see *Eastman* v. *United States*, 212 F. 2d 320, 322 (C.A. 9).

Although petitioner invites this Court to reconsider and reverse the rule of *Donnelly* v. *United States* along the lines of the dissent in that case, the facts of this case present no issue which would bring it within the rationale of the dissent. Petitioner neither proved nor offered to prove that Daniels ever made a statement to the narcotics agents exonerating petitioner. Defense counsel said he did not know

whether a statement had been made and whether, if there was one, it exonerated petitioner. Daniels was not shown to be deceased or otherwise unavailable as a witness. Even if Daniels had made a statement exonerating petitioner just after their joint arrest, such a statement taking the blame would not have the inherent credibility of the statement in *Donnelly*. Nor, in contrast to *Donnelly*, was such a statement corroborated by other evidence. To the contrary, here some of the heroin was thrown out of petitioner's automobile by petitioner (R. 9-10), and the rest was found in petitioner's yard (R. 12, 60). Even if the heroin belonged to Daniels, petitioner might well have been guilty of possessing the heroin. For these reasons, even if this Court had held in *Donnelly* that a voluntary confession by a stranger to the trial was admissible if the confession exonerated the defendant and the third party was not available as a witness, petitioner could not come within the terms of such a holding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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